United Nations AT/DEC/1103

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1103

Case No. 1198: DILLEYTA Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Mr. Kevin Haugh, Second Vice-President; Mr. Spyridon Flogaitis;

Whereas, on 10 June 2001, Aden Mohamed Dilleyta, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an Application containing pleas which read, in part, as follows:

"II: *PLEAS*

7. With respect to ... procedure, the Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings ...

(d) *to order* the Respondent to produce ... files and documentary evidence ...

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Executive Director of UNICEF to summarily dismiss the Applicant from service;

(b) *to find and rule* that the UNICEF Ad Hoc Joint Disciplinary Committee [(JDC)] erred in matters of fact and law in reaching its conclusions that the Applicant was guilty of misconduct ...

(c) *to order* that the Applicant be reinstated in service at the NOC level, with retroactive effect from 23 November 1999;

(d) *to award* the Applicant ... compensation on an exceptional basis in the amount of three years net base pay for the actual, consequential and moral damages suffered ... for the denial of due process and fair treatment ... and for the effects of the Respondent's prejudicial actions on him and his family;

(e) *to fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(f) *to order* that a letter exonerating the Applicant of any wrongdoing be published and that all prejudicial materials ... be removed from the Applicant's records;

(g) *to award* the Applicant as costs, the sum of $10,000.00 in legal fees and $500.00 in expenses ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2001 and twice thereafter until 31 March 2002;

Whereas the Respondent filed his Answer on 28 February 2002;

Whereas the Applicant filed Written Observations on 25 March 2003;

Whereas, on 1 April 2003, the Respondent filed an addendum to the Respondent's Answer;

Whereas on 9 April 2003, the Applicant submitted an additional communication;

Whereas, on 27 June 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF on a three-month fixed-term appointment as a Project Assistant at the GS-6 level, in Djibouti, on 1 March 1989. On 1 January 1993, he was promoted to the post of Assistant Information and Communication Officer at the National Officer category. At the time of the events which gave rise

to the present Application, the Applicant was serving on a two-year fixed-term appointment as Communication Officer.

On 29 March 1999, the Applicant was informed that an audit was being conducted in the UNICEF office in Djibouti and that the preliminary findings suggested his involvement in serious irregularities. He was further informed that, pending the completion of the investigation, he was being placed on suspension with pay but that this suspension did not constitute a disciplinary measure.

According to the Audit Report, catering services were obtained from a local bakery for the celebration of the Day of the Child, which took place on 22 November 1998. An invoice for 320,000 Djibouti francs (DF), supposedly issued by the bakery, was certified for payment by the Applicant and a cheque payable to the bakery was issued. Since this was a procurement action above US$ 500, it required a purchase order, which was not found and therefore the case was investigated. The investigators met with the owner of the bakery and his son who, when shown a copy of the invoice, indicated that it was false and that the original order from UNICEF was for DF38,000 only. They produced a copy of the bakery's original invoice, amounting to exactly DF38,000. Upon review of a copy of the cheque it was noted that it was decrossed by the Applicant and endorsed by him to a UNICEF driver, for cash. The driver admitted to having cashed the cheque and indicated that he paid the bakery DF38,000, paid also another supplier for drinks, and kept the rest of the money.

The Audit Report relates to another incident, regarding two invoices which the Applicant had certified for payment on 26 January 1995. The first invoice, for DF330,000 was printed on Ministry of Health letterhead, but did not show the name and title of the government official requesting payment, did not bear a stamp and the signature was unreadable. The second invoice, for DF215,000 appeared to be computer-generated and only indicated the names of two alleged suppliers. The investigation uncovered a hand-written note signed by the Applicant, addressed to the former Operations Officer, requesting that the cheques in payment for these services be made "to bearer". This, allegedly, at the request of a government official. The cheques were issued accordingly. Upon review of these cheques it was noted that both had been cashed by the Applicant's wife (who was a Secretary in the UNICEF Djibouti office).

On 9 June 1999, the Director, Division of Human Resources (DHR), wrote to the Applicant, transmitting a copy of the Audit Report and presenting him with formal charges as follows:

> "1. [The Applicant] misappropriated UNICEF resources, acted recklessly in [his] certification for payment of services provided to UNICEF, made false certifications and wilfully disregarded supply procedures...
>
> 2. [The Applicant] violated UNICEF procedures when [he] instructed that two particular cheques, which constituted payment for services that UNICEF had apparently committed to fund and which [the Applicant himself] certified, be issued to bearer".

According to DHR, as regards the first charge, the Applicant knew or should have known that the invoice was false; his certification for payment of the false invoice violated UNICEF procedures; and, he had willfully disregarded supply procedures and acted outside the scope of his authority. The Applicant also failed to follow sound financial practices when he had uncrossed the cheque issued to the bakery and further, the Applicant had no authority to endorse the cheque to a party other than the payee. Regarding the second charge, in instructing that the cheques be issued to bearer, the Applicant violated UNICEF procedures and undermined financial controls, placing UNICEF's financial resources at risk since such cheques could be cashed by anyone, as indeed happened when the Applicant's wife was able to cash the two cheques.

The Applicant was informed that his above described actions represented a clear violation of the highest standards of integrity expected of international civil servants and constituted serious misconduct, with which he was charged.

On 11 July 1999, the Applicant responded to the charges, claiming his innocence while adding that the accusations against him were false, and requesting that his suspension with pay be lifted. The Applicant maintained that he had to make decisions out of the scope of his authority because the "Delegate Representative" was absent and that he had made mistakes due to lack of knowledge of the administrative and financial procedures of UNICEF. He further alleged that the pressure from the Djiboutian authorities led to taking liberties with procedure in order to preserve cordial relations and trust with them. The Applicant concluded by adding that his acts were not of a criminal nature since the intention to cause damage was not there, and that he had always been an exemplary employee.

On 23 November 1999, the Applicant was informed that, following careful review of the matter as well as consideration of his 11 July letter, the Executive Director, UNICEF, had decided to summarily dismiss him. The Applicant was provided with a detailed response refuting each of the claims contained in his 11 July letter.

On 12 January 2000, the Applicant submitted his request for review of the decision to summarily dismiss him and, on 31 May, he was informed that his request had been referred to an ad hoc JDC.

The JDC submitted its report on 10 January 2001. Its findings, conclusions and recommendation read, in part, as follows:

"...

5. The JDC ... concluded ... that ... [the Appellant] ... was responsible for a reckless certification, a false certification and a willful disregard of supply procedures. ...

6. The JDC does wish to note that in general over the period of 1995 to 1999 during which the two incidents took place that the UNICEF Office appeared to be operating under frequently absent and poor management, with a lack of control, structure and planning that clearly impacted on the performance of the entire Office ... This environment might well be considered as an aggravating circumstance, particularly for someone left to act as Officer in Charge without adequate background or management skill to handle the situation. The responsibility for leaving [the Appellant] in charge, for poor management, and the lack of oversight and accountability for basic UNICEF functions surely extends upward and to others. ...

7. ... While the JDC recognizes that charges brought against the Appellant and his conduct must be considered separately from the conduct of others, the Office circumstance seems a relevant consideration in advising on the appropriateness of the most severe disciplinary measure that has been imposed on the Appellant.

8. The JDC concluded, ... , that [the Appellant] actions in both 1995 and 1999 should be considered as misconduct rather than unsatisfactory performance in that despite the aggravating office situation, both incidents were egregious acts that constitute misconduct under the definitions provided by the UN Staff Rules.

9. The JDC noted [the Appellant] allegations of bias and prejudice in consideration of his case. The JDC did not find evidence to support this allegation ...

10. ... the JDC unanimously concluded that the misconduct charges were appropriate for both the 1995 and 1999 incidents and that due process had been regarded. However, with regard to its responsibility to advise on

> disciplinary matters, the JDC questioned if the disciplinary measure ... separation from service, with or without notice or compensation in lieu of notice ... might be a more appropriate disciplinary measure, given [the Appellant] ten years of service, and the possible aggravating circumstance of the office situation which was beyond his responsibility. ... the JDC ... can only recommend that the Executive Director ... determine whether the aggravating circumstances of the Office contributed to [the Appellant's] misconduct, and therefore permit a less severe disciplinary measure than summary dismissal."

On 9 March 2001, the Executive Director, UNICEF, transmitted a copy of the JDC report to the Applicant and informed him that:

> "After careful consideration of the JDC's recommendation, I have decided to maintain your summary dismissal. I cannot give weight for either exculpatory or mitigating purposes to the circumstances to which the Committee has referred. Your actions were egregious in nature and constitute serious misconduct. You remain personally and exclusively accountable for your acts of serious misconduct in which you knowingly engaged, in violation of the highest standards of integrity."

On 10 June 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The charge of sub-standard performance is not borne out by the record; the evidence does not support the JDC's conclusions.

2. The Applicant was unprepared for the responsibilities of Officer-in-Charge, particularly as he did not receive any formal training from UNICEF regarding the financial rules and regulations.

3. It is unfair to bring charges based upon a transaction that occurred four years earlier.

4. The Applicant did not seek to profit from the transactions.

5. The Applicant's rights of due process were violated.

6. The Applicant appears to have been singled out for especially harsh treatment. The disciplinary measure of summary dismissal is disproportionate even if the Applicant is found to have been grossly negligent.

Whereas the Respondent's principal contentions are:

1. The decision to summarily dismiss the Applicant was a valid exercise of that discretionary authority, and was not vitiated by substantive irregularity, procedural irregularity, improper motive, abuse of discretion or any other extraneous factors.

2. The Applicant failed to meet the standards of conduct required of staff members as international civil servants.

3. The Applicant was accorded due process.

4. The investigation into the allegations against the Applicant was not improperly motivated, nor was it tainted with bias or other extraneous factors.

The Tribunal, having deliberated from 27 June to 21 July 2003, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision to summarily dismiss him from service for serious misconduct. The Applicant claims that his summary dismissal was procedurally deficient, discriminatory in nature and taken without regard to his due process rights and to the procedures as set out in the Staff Regulations and Rules.

II. The Applicant had been serving on a two-year fixed-term appointment as Communication Officer at the UNICEF Office in Djibuti when, on 29 March 1999, he was notified that an audit of this office suggested his involvement in serious irregularities. The Applicant was placed on suspension with pay while the investigation continued and, on 9 June, he was presented with the formal charges against him, as follows:

(i) misappropriation of UNICEF resources, acting recklessly in certifying payments for services provided to UNICEF, making false certifications and willfully disregarding supply procedures, and (ii) violation of UNICEF procedures when instructing that two checks, which constituted payment for services that UNICEF had committed to fund and which the Applicant had certified, be issued to bearer.

III. The Applicant responded to the charges on 11 July 1999, claiming his innocence while explaining that his actions were the result of the necessity to act under time pressure, without any training in financial procedures and with no guidance from his supervisors. On 23 November, the Applicant's claims were answered in detail and he was informed of the Executive Director's decision to summarily dismiss him in accordance with staff regulation 10.2. Subsequently, an ad hoc JDC was constituted and submitted its report on 10 January 2001, unanimously concluding that, "the misconduct charges were appropriate and that due process had been regarded". On 9 March 2001, the Applicant was informed of the Executive Director's decision to maintain the Applicant's summary dismissal. This Application followed.

IV. The Applicant contends that the Respondent's decision to terminate him from service was not a proper exercise of the latter's authority and that the finding of misconduct should have been recognized as unsatisfactory performance. The Respondent argues that the decision to separate the Applicant from service constitutes a valid exercise of the discretionary powers of the Executive Director of UNICEF.

V. It has been the longstanding jurisprudence of the Tribunal that the Secretary-General (and through delegation also the administrators of the subsidiary organs such as the Executive Director of UNICEF) has broad discretion with regard to disciplinary matters. (See Judgments No. 300, *Sheye*, (1982) and No. 987, *Edongo* (2000).) This includes the determination of what constitutes "serious misconduct" under the Staff Regulations and Rules and what is the proper punishment for such conduct. (See Judgments No. 815, *Calin* (1997), No. 890, *Augustine* (1998) and No. 1050, *Ogalle* (2002).) Yet these broad disciplinary powers are not without limitation. The Tribunal has consistently reaffirmed its competence to review the Secretary-General's exercise of these discretionary powers, though it has also held that such review is confined to certain exceptional conditions, i.e. to determining whether these actions were vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact, amongst additional criteria. (See Judgments No. 993, *Munansangu* (2001) and No. 1090, *Berg* (2003).)

Thus, in disciplinary cases, the Tribunal generally examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose, (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness (See Judgment No. 898, *Uggla* (1998) and No. 941, *Kiwanuka* (1999).)

VI. Having reviewed the facts and particularly the explanations provided by the Applicant for his actions, the Tribunal concurs with the JDC's conclusion that the Applicant's actions "should be considered as *misconduct* rather than *unsatisfactory performance*", the latter being conduct ordinarily characterized as arising out of innate incapacity or inefficiency. The Tribunal accepts that the Respondent had established before the JDC a *prima facie* case in relation to the allegations of misconduct. This did not mean that unless the Applicant established his innocence or provided some satisfactory explanation for his conduct, the JDC had to decide against him. The finding that a *prima facie* case had been made means only that the Respondent had established a case, which would entitle the JDC to conclude that the Applicant was guilty, when it accepts and is persuaded by the evidence offered as to his guilt. In this case, the JDC rejected the Applicant's protestations and explanations. The Tribunal is satisfied that it was entitled to do so.

The Respondent refers to the cases of *Kiwanuka, ibid,* and *Jhuthi*, (Judgement No. 897 (1998)) contending that, if a *prima facie* case of misconduct is made, the Applicant must provide a proper explanation or evidence to rebut it, otherwise, a conclusion of misconduct could be reached. Insofar as the Respondent relies upon these two cases claiming that they support the above proposition, the Tribunal wishes to refer to the appropriate passage from *Jhuthi*, which reads as follows:

> "In disciplinary cases, when the Administration produces evidence that raises a reasonable inference that the Applicant is guilty of the alleged misconduct, generally termed a prima facie case of misconduct, that conclusion will stand. The exception is if the Tribunal chooses not to accept the evidence, or the Applicant provides a credible explanation or other evidence, that makes such a conclusion improbable. This is what was meant when the Tribunal stated in Judgement No. 484, *Omosola* (1990), paragraph II, that 'once a prima facie

case of misconduct is established, the staff member must provide satisfactory proof justifying the conduct in question.'"

The citation relied upon by the Respondent does not support the contention argued for by the Respondent. The onus of proof does not shift to the Applicant upon the establishment of a *prima facie* case. It need hardly be added that, where the evidence offered establishes a *prima facie* case, and that evidence is not contradicted, or where the conduct is not explained, such case will almost inevitably result in a conviction.

In this case, the Applicant failed to present any convincing explanation for his actions in certifying payments that he knew, or should have known, were based on false invoices. Likewise, his explanations for instructing that cheques be made payable to bearer and thus enabling a person other than the payee, and in this case the Applicant's wife, to cash them, were unconvincing. The Tribunal believes that such actions cannot be excused by claiming to have been pressured by time constraints, nor by lack of knowledge of the Financial Rules. Common sense and integrity would suggest avoiding such actions.

VII. The decision to summarily dismiss the Applicant was a proper exercise of the Executive Director's authority and did not violate the Applicant's rights. The choice of disciplinary measure to be imposed, pursuant to Staff regulation 10.2, falls within the Secretary-General's discretionary powers (Judgments No. 479, *Caine* (1990); No. 542, *Pennacchi* (1991); and, Kiwanuka (*ibid.*).) Staff members have a duty to maintain the highest standards of conduct and the Respondent has the responsibility to enforce those standards. The Tribunal finds that the procedures set forth in Chapter 15 of the UNICEF Human Resources Manual had been adhered to and that the Applicant's rights were observed.

VIII. The Applicant claims that there was a cultural bias implicit in the charges brought against him because the investigation did not take into account the difficult circumstances under which the UNICEF Djibouti Office was operating, nor the fact that he had not received any formal training from UNICEF on its financial rules.

It has been the consistent jurisprudence of the Tribunal that, where an Applicant alleges bias or other improper motivation or extraneous factors vis-à-vis a contested decision, that he carry the burden of proof in relation thereto. (See Judgements No. 553, *Abrah* (1992), and No. 874, *Abbas* (1998).)

The Tribunal is of the opinion that whilst the environment in which the UNICEF Djibouti Office was operating indeed left something to be desired, the Applicant has failed to establish any bias against him. Accordingly, the Tribunal rejects the Applicant's allegation that the investigation was tainted with bias or other extraneous factors.

IX. The Tribunal took note of the Applicant's request for production of certain documents which, the Applicant argues, would support his claim that the Organization did not sustain any financial loss due to his actions. The Tribunal rejects this request, as this is not germane to the issue of whether the Applicant is responsible for the misconduct that he had been charged with. Even if no monetary loss occurred, the Applicant was still responsible for reckless certification, a false certification and a willful disregard of supply and payment procedures. Serious misconduct is not measured by its consequences but rather by the seriousness of the conduct. (See Judgement No. 926, *Al Ansari* (1999).)

X. The Applicant argues that the Respondent's findings that he had been guilty of gross negligence had no foundation, claiming that gross negligence is measured by the damage the negligence has caused or by the intention of the actor found to have been guilty of such negligence. The Tribunal is satisfied that the Applicant's definition of "gross negligence" is erroneous.

XI. In conclusion, the Tribunal holds that the UNICEF Executive Director exercised reasonable and necessary discretion when concluding that the Applicant had engaged in serious misconduct and that he had failed to meet the highest standards of conduct expected of an international civil servant. Further, the Tribunal holds that the Applicant had been accorded due process, and that the decision to summarily dismiss him was not tainted by prejudice, arbitrariness or other extraneous factors.

XII. For the foregoing reasons, the Application is rejected in its entirety.

(Signatures)

Mayer **Gabay**
First Vice-President, presiding

Kevin **Haugh**
Second Vice-President

Spyridon **Flogaitis**
Member

Geneva, 21 July 2003

Maritza **Struyvenberg**
Executive Secretary

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